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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO, INC.,

Petitioner,

v.

HASBROUCK, d/b/a RICK'S TEXACO, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

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The Petroleum Marketers Association of America (PMAA) submits this brief *amicus curiae* in support of the petition for writ of certiorari filed by Texaco, Inc., No. 87-2048.

INTEREST OF AMICUS CURIAE

The PMAA is a federation of 43 State and regional trade associations representing over ten thousand small business petroleum marketers.[1] Together, PMAA members market

[1] A list of the constituent State and regional trade associations that comprise the PMAA is set forth in the Appendix hereto.

approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply roughly two-thirds of the Nation's retail motor fuel facilities,[2] approximately three-quarters of which are operated by independent retailers. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products as well as chain retailers that market motor fuels through service station outlets. Historically, refiners have chosen to market a large percentage of their products through independent marketers because the Nation's vast petroleum supply network requires capital and manpower expenditures greater than the resources of even the largest corporate entities.

The PMAA has a direct and significant interest in the pending petition for certiorari. The petition seeks review of a decision of the Ninth Circuit Court of Appeals[3] that unquestionably affects the economic interest of PMAA members; quite simply, it impacts on their ability to purchase petroleum products from a manufacturer at lower prices than are available at the retail level of trade. Wholesale distributors, of course, resell the products they purchase to independent retailers, a function that cannot be performed if they are required to purchase petroleum at the same prices that are offered to their customers' competitors.

[2] Independent marketers own or lease over 58,000 retail facilities nationwide and store fuel at over 10,000 additional "bulk plants." PMAA's 1986 member survey discloses that its members supplied 97,871 of America's approximately 150,000 retail motor fuel distribution outlets (e.g. gasoline stations, truck stops, convenience stores, etc.). Their 230,000 employees service this network with roughly 100,000 vehicles and they bear the credit costs and risks of approximately $13 billion in credit card sales that they and their dealers make to the American motoring public annually.

[3] *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988).

The price disparities that exist at the wholesale and retail levels of trade are reflective of the functional differences that exist between wholesalers and retailers and have been a hallmark of the petroleum distribution system for generations. Yet the court below regards them not as part of the normal functioning of the system, but as anomalies that cannot be justified absent rigorous regulation by the manufacturer to insure that functional discounts do not exceed the value of the services performed by the wholesaler. Thus, the court below would sanction an inference of illegal price discrimination whenever price disparities exist between non-competing wholesalers and retailers and the benefits of the wholesaler's lower prices are passed through, in whole or in part, to its retail customers.

Not only is the Ninth Circuit's decision in this case unprecedented as an application of the Robinson-Patman Act, 15 U.S.C. Section 13(a), but also in the impact it will have on the fabric of the petroleum industry, and particularly upon the ability of wholesale distributors to remain a competitive force in the distribution of petroleum products. By subjecting the manufacturers of petroleum products to liability for the independent decisions of wholesale marketers to pass through some portion of their wholesale discounts, the lower court risks the elimination of such discounts and invites a system of price regulation by manufacturers that is not responsive to a free play of competitive forces.

ARGUMENT

Owing mainly to the imprecision with which the Robinson-Patman Act was drafted, the efforts of the courts in this area have been aimed primarily at achieving results thought to be consistent with the spirit or purposes of the Act. *See, e.g.*, *Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127, 1138 (D.C.

Cir. 1988). Thus, the body of decisional law that grew up around the Act is a patchwork of often inconsistent rules and proscriptions, each of which was crafted to combat the evils that were the focus of the Act in one of the vastly different circumstances that arise in complex competitive markets. Because these rules sometimes come into conflict with one another, however, or with the purposes of other antitrust legislation, their application in a particular case cannot be automatic; on the contrary, Robinson-Patman precedents that do not fit the logic of particular contextual circumstances or the industry to which they are being applied can often lead to counter-productive results.[4]

This case presents a classic example. Here, the Ninth Circuit drew upon a series of disparate judicial interpretations and applications and forged a decision that neither comports with the purposes of the Robinson-Patman Act nor is workable within the complex petroleum distribution system. As will be developed more fully below, the decision of the court of appeals is structured, as if by rote, from rules meant for vastly different situations. That they do not gel in the context of this case is apparent from the fact that the decision would result in the elimination of wholesale discounts in many cases and,

[4] Nowhere is the uncertainty infecting the Act more prevalent than in the area of functional or wholesale discounts. As then-Professor (now Acting FTC Chairman) Calvani noted: "[T]he uncertain status of functional discounting is primarily due to the failure of Congress, the Federal Trade Commission, and the courts to give explicit and independent recognition to the practice and to define with any modicum of specificity its permissible contours. The result of this failure of recognition has been a lack of focus upon the validity of the functional discount which, in turn, has left the law in a state of confusion, causing often legitimate practices to be condemned." Calvani, *Functional Discounts Under the Robinson-Patman Act, 17 B.C. Indus. & Com. L. Rev. 543, 543-44 (1976). See also, e.g., Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65-74 (1953).

in place thereof, the establishment of a cumbersome cost-based pricing system that is unresponsive to the competitive realities of a free market. This was clearly not the objective of the Robinson-Patman Act.[5]

I. The Ninth Circuit's Decision Will Usher In A Regime Of Refiner Price Regulation Or Other Anticompetitive Forces In The Petroleum Industry

A. Wholesale Discounts Are Essential To The Maintenance Of The Present Competitive Pricing System

For generations, the petroleum industry has been characterized by a complex distribution scheme involving dozens of refiners and their marketing subsidiaries, thousands of independent wholesale distributors, and tens of thousands of chain retailers and independent service station dealers. The distribution system evolved in response to the demands of market forces and has maintained a synergism among the various participants, each of which brings its unique efficiencies to a wide variety of competitive markets. Each of these participants plays an integral role in the system which would be vastly different in its absence.

Wholesale distributors, for example, are generally supplied with petroleum products by large refiners and they resell the products to independent service station dealers. For the most

[5] The Supreme Court summarized the purposes animating Congress in passing the statute in the following way:

> The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chain stores and other big buyers that threatened the existence of small independent retailers. *Great A&P Tea Co. v. F.T.C.*, 440 U.S. 69, 75-76 (1979).

part, they occupy a market niche in areas where it is not cost-effective for their refiner-suppliers to maintain direct marketing operations. Competitive markets for petroleum products, of course, are not national or regional, but local.[6] Thus, a major refiner can maintain its brand in a particular local market without incurring the expenses of investing its capital in marketing facilities. As the U.S. Department of Energy ("DOE") observed after a review of refiner marketing strategies, ". . . jobbers are more efficient and better positioned to distribute in more widely dispersed areas where distribution costs tend to be relatively high for refiners."[7]

Depending upon logistical and other considerations, a given refiner may choose to market directly in an area or market exclusively through wholesale distributors. Because of demographic changes, however, historical marketing patterns in certain areas have been altered and it is not uncommon for refiners to engage in dual distribution in certain areas, i.e., to market directly as well as through branded distributors. Thus, some jobbers have found themselves confronted with competition from their own suppliers in certain marketing areas, sometimes referred to as overlap areas. "[T]hese overlap areas exhibit intense price rivalry . . . [a]s a result, . . . [the DOE concluded] that the competitive process is working vigorously in these areas with the consumer the ultimate beneficiary."[8] Because of their efficiencies, wholesale distributors are able to operate in these areas and they are often the only factor separating a vibrant competitive market from one that is characterized by stagnancy and higher than average prices.

[6] As the U.S. Department of Energy has already determined, no one will drive more than a few miles in search of a lower price for gasoline or, given the transportation costs involved, order heating oil from another city. See, "Guidelines For Evaluation Of Applications For Assignment Of Supplier And Base Period Use To New Gasoline Retail Sales Outlets," 42 Fed. Reg. 15459 (March 22, 1977).

[7] U.S. Department of Energy, Deregulated Gasoline Marketing, *Consequences for Competition, Competitors and Consumers*, DOE/CP-0007 (1984) at 43.

[8] *Id.* at 126 n.2.

While wholesale distributors are woven deeply into the fabric of the petroleum industry, their presence is made continually precarious by changes or alterations in the pricing practices of their refiner-suppliers. In areas where they market, wholesale distributors can be profitable only when the prices at which they purchase petroleum products enable them to resell at a profit, after incurring the distributional costs of storing, delivering and promoting the product, helping their customers become successful marketers, extending credit and providing for investments in tools, tanks, trucks and other equipment. In short, wholesale distributors are extremely price sensitive and they cannot afford to purchase petroleum products at the same prices that are offered to the independent service station dealers whom they are in the business of supplying.

Refiner suppliers have traditionally offered functional discounts to jobbers and other wholesale distributors because of the savings realized by the refiner who would otherwise be required to make additional capital investments. While each individual wholesale discount may not be equal to the average cost savings realized by the refiner for that particular sale, the aggregate of all wholesale discounts offered by a given refiner in a given market, over a period of time, must be offset by the savings to the refiner from not establishing a major market presence. Were it not so, refiners would maintain direct marketing operations in all areas where they wish to market and there would be no wholesale distributors.

Wholesale discounts of the type at issue in this case enable independent distributors to operate as an alternative, in many

markets, to their refiner-suppliers whose higher fixed costs and lower efficiencies in the same markets usually result in less competition and higher prices.

B. By Threatening The Existence Of Wholesale Discounts, The Decision Below Will Reduce The Impact Of Wholesale Distributors As A Competitive Force In The Petroleum Industry

While acknowledging that wholesale or functional discounts offered equally to all wholesale distributors will not normally constitute illegal price discrimination, the Ninth Circuit held that injury to competition is established, *prima facie*, whenever the price differentials between non-competing wholesale and retail customers: (1) exceed "the value of the services [a wholesale distributor] perform[s];" and (2) the discount is passed through, in whole or in part, to the wholesaler's retail customers. 842 F.2d at 1039.

This doctrinaire application of the Robinson-Patman Act is most troubling because it exposes refiner suppliers, such as Texaco, to liability for the independent pricing determinations of their wholesale customers. Under the court of appeals' decision, refiners risk liability whenever their wholesale customers decide to pass on a portion of a wholesale discount to retailers.[9] Thus, any refiner offering wholesale discounts risks running afoul of Section 2(a) of the Robinson-Patman Act unless it: (1) stops offering wholesale discounts; (2) prohibits its wholesale customers from passing through all or a portion of

[9] *See, Purolator Products, Inc. v. F.T.C.*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968) ("If the seller cannot control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.").

the discount; or (3) regulates the level of pass through based upon precise calculations as to the "value" of the distributional services performed by the wholesale customer with respect to each sale. Any one of these alternatives would have extraordinary consequences for the petroleum industry.

The consequences for wholesale distributors of losing their discounts are obvious; if they purchase petroleum products at the same prices that are available to direct-buying retail dealers, they would be unable to resell the product to their own retail dealer customers at competitive prices. The same would be true if they were prohibited from passing through any portion of their discounts to retail customers. Were that the case, there would be no incentive to practice the efficiencies that make such pass throughs possible.[10] Moreover, to the extent that a wholesale distributor and its refiner-supplier cooperate in a scheme to regulate pass throughs, they would be exposed to resale price maintenance claims under Section 1 of the Sherman Act.[11]

Finally, no refiner-supplier can be expected to incur the massive administrative burden associated with justifying each functional discount on a cost-savings basis. The refiner-supplier would be required to know the number of days the product was stored by the distributor prior to resale, whether credit was extended upon resale and the credit risk, the costs associated with delivery of the product by the wholesale distributor to its own customer, as well as the *pro rata* portion of all of the other fixed and variable costs associated with delivering

[10] In many cases, the incentive animating wholesalers to achieve efficiencies and market at the lowest practical price is to increase market share.

[11] 15 U.S.C. Section 1. The longstanding recognition of price maintenance as a Sherman Act violation is reflected in this Court's opinion in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960).

a certain volume of product to a given destination. It would also be required to place a "value" on certain intangible services provided by the wholesaler, such as product promotion and the assistance provided retail dealers in becoming effective marketers. These costs vary from distributor to distributor and from time to time and are impossible to calculate with any degree of precision.

The decision of the Ninth Circuit, therefore, will signal the demise of at least those wholesale distributors in overlap areas, whose presence in the distribution system can no longer be justified if refiner-suppliers are exposed to a substantially increased risk of antitrust liability. Those wholesalers that remain, moreover, will be subjected to a form of refiner price regulation that can only lead to higher prices and less competition at the wholesale and retail levels. While it is impossible to estimate the extent of these dislocations, one thing is certain, that is, the effect will be anticompetitive and in contravention of the stated objectives of the Robinson-Patman Act.

II. This Court's Precedents Cannot Support A Decision, Such As The One Below, That Contravenes The Objectives Of The Robinson-Patman Act

This Court warned long ago of the dangers of doctrinaire interpretations of Robinson-Patman that could lead to "conflict with the purposes of other antitrust legislation," *Automatic Canteen Co. v. F.T.C., supra*, 346 U.S. at 63, and that warning has been repeated in more recent times. See *United States v. Gypsum Co.*, 438 U.S. 422, 450-51 (1978); *Great A&P Tea Co. v. F.T.C., supra*, 440 U.S. at 80. That the Ninth Circuit did not heed this warning is apparent from the anticompetitive impact its decision will have on the petroleum distribution system.

To be sure, the court below applied some of the precedents established by this Court. But in so doing, its focus was narrow and unguided by the objectives of the Act. The Robinson-Patman Act was aimed at protecting small retail businesses against favoritism toward their larger competitors and its objective was the elimination of the competitive advantage a large buyer could secure solely because of its quantity purchasing ability. *F.T.C. v. Morton Salt*, 334 U.S. 37, 43 (1948). The focus of the Act was the quantity discount to large buyers and the inability of other buyers, at the same level of distribution, to secure the same discount so long as they performed the same function. It was not aimed at dismantling a system of functional discounts that was associated with the petroleum industry prior to passage of the Act and which has contributed to its efficiency for generations.[12]

As stated above, the Ninth Circuit reached this result through a rote application of precedents that were meant for vastly different situations, without any real focus on enhancing the Act's purpose and design. Relying on this Court's decisions in *Morton Salt* and *Falls City Industries, Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428 (1983), the court of appeals held that a plaintiff may prove competitive injury under Robinson-Patman simply by showing that a substantial price disparity existed between himself and his competitors over a period of time. 842 F.2d at 1041. Then, citing *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49 (1969), it applied the

[12] In fact, one of the purposes of the Act was to preserve the multitiered distribution system by preventing powerful retailers from receiving discriminatory price advantages. *See generally*, J. Palamountain, *The Politics of Distribution* 188-234 (1955). *See also, e.g.*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act 11* (1962), ("the prototype of the Robinson-Patman Act originated with the United States Wholesale Grocers Association, whose members felt the [retail] chain stores' competitive pinch.").

Morton Salt standard to this case, even though the plaintiffs and the favored buyers do not compete. It held that the *Morton Salt* inference of competitive injury is applicable to non-competing buyers when the favored buyer passes on "all or a portion" of its discount to its own customers. 842 F.2d at 1041. These precedents, however, were not intended to be combined in this fashion to attack "a long-established, widespread practice within a vibrant, dynamic industry."[13]

In *Morton Salt,* for example, this Court was confronted with a salt manufacturer's discount pricing system under which only the five largest retail grocery chains in the country were able to buy enough salt to qualify for the manufacturer's most lucrative discount. This was the classic Robinson-Patman case aimed at the very type of price discrimination that the Act was designed to prevent, namely, a system that discriminates among *competing* buyers simply by virtue of their size. Thus, it was self-evident to this Court that the longstanding and substantial price disparity in *Morton Salt* was proof of the evil that Robinson-Patman was aimed at preventing.

Where there are no functional differences between competing purchasers, substantial price disparities give rise to an inference of illegal price discrimination because there is no apparent justification for the price difference other than the favoritism that prompted Congress to enact Robinson-Patman.[14] Thus, under the doctrine set forth in *Morton Salt,* the burden rests with the manufacturer to justify the discount "based on his actual savings in cost." *Morton Salt,* 334 U.S. at 48.

[13] *See, Boise Cascade Corporation v. F.T.C., supra,* 837 F.2d at 1146.

[14] In the circumstances of *Morton Salt,* this Court found a basis for the inference of illegal price discrimination in "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46-47.

In recent years, this Court has not been hesitant to apply the *Morton Salt* inference of competitive injury to other "cases involving 'large buyer preference or seller predation.' " *Falls City,* 460 U.S. at 436. But in each of these cases, the inference was applied in a context where the favored and disfavored buyers were actually in competition.[15] In *Falls City,* of course, the Court applied the *Morton Salt* rule to a pricing system that discriminated solely on the basis of the geographic location of the buyer. In that case, Indiana distributors of Falls City beer were charged higher prices than Kentucky beer distributors — again, the very sort of arbitrary price discrimination among competing customers that was the focus of the Act.

Unlike *Morton Salt* and *Falls City,* however, the price discrimination at issue here was not applied to competing purchasers. Nor was it rooted in any favoritism for an elite group of Texaco's largest customers; indeed, there is no dispute that the wholesale discounts at issue were made available to all wholesalers, irrespective of size.[16] Quite to the contrary, the pricing system involved in this case discriminates logically among wholesalers and retailers based upon the functions they perform and enables wholesalers to operate on a competitive basis in an industry that is distinguished by intense competition at the wholesale and retail levels. It cannot be "self-evident," therefore, that the price disparity between

[15] *See, e.g., National Dairy Products Corp. v. F.T.C.,* 395 F.2d 517, 521 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana),* 466 F.2d 1163, 1174 (7th Cir. 1972). *See also, e.g., Barnosky Oils Inc. v. Union Oil Co.,* 665 F.2d 74, 83-84 (6th Cir. 1981); *Hruby Dist. Co.,* 61 F.T.C. 1437, 1446 (1962) ("In its section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices.").

[16] (ER 432, 435-36, 438).

petroleum wholesalers and retail service station dealers is *prima facie* evidence of illegal price discrimination. If anything, the inference should be just the opposite, that is, an inference that price disparities between non-competing wholesalers and retailers are deemed justified on a functional basis in the absence of direct evidence of harm to competition.

The court below felt obliged to apply the *Morton Salt* inference of competitive injury to non-competing wholesalers and retailers on the basis of this Court's decision in *Perkins v. Standard Oil Co., supra*. It cited *Perkins* for the proposition that substantial price disparities between wholesalers and retailers of petroleum products give rise to the same inference of illegal price discrimination as do price disparities that exist between competing purchasers, so long as the wholesaler passes on a portion of its discount to its retail customers. Yet in Perkins the favored and disfavored buyers were dual distributors operating at both the wholesale and retail levels. The disfavored buyer, Perkins, "was both a wholesaler, operating storage plants and trucking equipment, and a retailer through his own Perkins stations." 395 U.S. at 44. The favored buyer, Signal Oil & Gas Company, was the parent of vertically integrated subsidiaries, one of which operated a chain of retail service stations. *Id.* at 645. Functionally, there was no difference between the favored and disfavored buyers; both of them purchased gasoline from Standard and resold the product at their own directly operated stations.

Unlike the situation presented here, *Perkins* has all of the elements of a paradigmatic Robinson-Patman case. Because Signal furnished Standard with part of its vital supply of crude petroleum, it was able to insist upon a lower price than was offered to its competitor, Perkins, who performed the same marketing functions. *Id.* at 647. The root of the controversy was the favoritism shown to one buyer over its competitor

based upon factors that are unrelated to the functions they performed. As was the case in *Morton Salt*, illegal price discrimination was "self evident" and inferred from the price disparities that resulted from the favoritism shown to Signal.

Rather than focusing on the essence of *Perkins*, and the manner in which it fit the Act's purpose and design, the court below seized on certain language that has no application in the instant case. The language referred to by the Ninth Circuit — involving the Robinson-Patman liability of wholesalers who "pass through" their discounts to retailers — was meant to ensure that the favored buyer, Signal, did not escape Robinson-Patman liability on purely technical grounds, even though its conduct violated the objectives of the Act. In *Perkins*, of course, Signal's price advantage was "passed on" to one subsidiary which, in turn, passed it on to another subsidiary that competed with Perkins at the retail level. When the lower court found that there was too tenuous a connection between Signal's price advantage and its subsidiary's lower retail prices to support an inference of causality, this Court reversed, holding that the scheme is "wholly untenable when viewed in light of the purposes of the Robinson-Patman Act." 395 U.S. at 647. Indeed, such a scheme "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Id.* In essence, this Court found that Signal, and not its retail subsidiary, was the "customer" that competed with Perkins.[17]

In this case, unlike *Perkins*, there is no artificial link in the distribution chain; rather, any pass throughs of functional discounts occurred between wholly independent wholesalers and retailers and were at all times dictated by a free play of com-

[17] *Perkins v. Standard Oil Co., supra*, 395 U.S. at 647.

petitive forces. The "pass-through" language of *Perkins*, therefore, does not support an inference of illegal price discrimination where, as here, the favored and disfavored buyers truly do not compete.[18]

In short, the decision of the court below contravenes the purposes and objectives of the Robinson-Patman Act as well as other antitrust legislation aimed at protecting competition. Wholesale discounts of the type at issue in this case are essential to the continued existence of many wholesale distributors and to the efficiencies they bring to the petroleum distribution system. Such discounts are part of the normal functioning of a highly competitive industry; in the absence of direct evidence of harm to competition, therefore, the only thing that is "self-evident" is that the system is functioning as it should and that any price disparities which exist between non-competing wholesalers and retailers reflect the different functions they perform at different levels of trade. These differences clearly should not give rise to an inference of illegal price discrimination.

[18] That the *Morton Salt* inference of competitive injury was not intended to be applied in the circumstances presented here is obvious from this Court's subsequent applications. In *Falls City*, for example, the Court stated that "[the] inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435. In the circumstances presented here, the causal connection is necessarily broken by the independent pricing determination of the wholesale distributor to pass through all or some portion of its functional discount. Thus, where the inference arises from price disparities between non-competing wholesalers and retailers, the inference of illegal price discrimination is overcome *a fortiori* at the same time that it is established.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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